(2)

No. 89-1906

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SAMUEL DEUTSCH,

Petitioner,

—vs.—

ROBERT G. FLANNERY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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July 9, 1990

QUESTION PRESENTED

Where the Interstate Commerce Commission acting pursuant to its exclusive jurisdiction, as set forth in the Interstate Commerce Act, 49 U.S.C. §§ 11341-51, authorizes the acquisition of one railroad by another at $20 per share, is a subsequent challenge to that purchase price in federal district court under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78n(e), properly dismissed (a) for lack of jurisdiction, and (b) as an impermissible collateral attack on an Interstate Commerce Commission order?

LIST OF PARTIES AND RULE 29.1 LIST

The names of the parties to the proceeding are contained in the caption to the petition.

Set forth below, pursuant to Rule 29.1, is a list of all parent companies and subsidiaries (except wholly-owned subsidiaries) of respondents The Western Pacific Railroad Company and Union Pacific Corporation:

The Alton & Southern Railway Company

Arkansas & Memphis Railway Bridge & Terminal Company

The Belt Railway Company of Chicago

Brownsville & Matamoros Bridge Company

Chicago and Western Indiana Railroad Company

Houston Belt & Terminal Railway Company

Southern Illinois and Missouri Bridge Company

Terminal Railroad Association of St. Louis

Texas City Terminal Railway Company

Terminal Industrial Land Company

Alameda Belt Line

Camas Prairie Railroad Company

Central California Traction Company

The Denver Union Terminal Railway Company

Kansas City Terminal Railway Company

Longview Switching Company

Oakland Terminal Railway

The Ogden Union Railway and Depot Company

Portland Terminal Railroad Company

Portland Traction Company

St. Joseph Terminal Railroad Company

Trailer Train Company

Rhone-Poulenc of Wyoming Company

Uinta Development Company

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Union Pacific Corporation ("Union Pacific"), The Western Pacific Railroad Company ("WesPac") and the former directors of WesPac respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Ninth Circuit Court of Appeals' judgment unanimously affirming the dismissal of this action by the United States District Court for the Northern District of California.

STATEMENT OF THE CASE

Petitioner's complaint in this action sought to challenge, under §§ 10(b) and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78n(e) (1988), the $20 per share

purchase price paid by Union Pacific to WesPac shareholders in connection with its acquisition of control of WesPac. Petitioner's complaint principally alleged that the $20 per share price did not reflect the true market value of certain WesPac real estate holdings acquired in the transaction.

Union Pacific's acquisition of control of WesPac, pursuant to a 1980 Agreement of Merger, was fully reviewed and approved by the Interstate Commerce Commission ("ICC") pursuant to its exclusive jurisdiction and authority under subchapter III of Chapter 113 of the Interstate Commerce Act, 49 U.S.C. §§ 11341-51 (1982 & Supp. V 1987). As part of that process, the ICC reviewed claims such as petitioner's regarding the value of WesPac real estate holdings, found them to be without merit and authorized and approved the $20 per share purchase price.[1] The Ninth Circuit properly determined that petitioner's challenge to this aspect of the ICC-approved transaction was within the exclusive jurisdiction of the ICC and that the district court's dismissal of the complaint was correct.

A. The 1980 Agreement Of Merger

Union Pacific and WesPac operate interstate railroads subject to the jurisdiction of the ICC. More than a decade ago, in January 1980, they entered into an Agreement of Merger whereby Union Pacific would acquire WesPac, subject to the required approval of the ICC. The Agreement of Merger provided for a unitary transaction in which Union Pacific would make a tender offer of $20 per share for WesPac shares followed by a back-end cash-out merger of any non-tendering shareholders, also at $20 per share.

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1 Three decisions of the Interstate Commerce Commission addressed these issues: *Union Pacific Corp.*, 366 I.C.C. 459 (1982), *aff'd sub nom. Southern Pac. Transp. Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985); *Union Pacific Corp.*, Finance Docket No. 30,000 (Sub-No. 1) (ICC June 10, 1983); *Union Pacific Corp.*, Finance Docket No. 30,000 (Sub-No. 1) (ICC Jan. 28, 1987) (LEXIS, Trans. library, ICC file), *aff'd sub nom. Western Pac. Stockholders' Protective Comm. v. ICC*, 848 F.2d 1301 (D.C. Cir. 1988).

B. ICC Approval Of The Acquisition

Pursuant to the terms of the Agreement of Merger, Union Pacific commenced a tender offer on January 23, 1980 for the Class A common stock of WesPac at $20 per share in cash. At the time of the tender offer the shares were publicly trading at about $14.50, although they had been traded at prices as low as $10.25 earlier that month. *Union Pacific Corp.*, 366 I.C.C. 459, 637 (1982). WesPac had become a publicly owned corporation less than one year earlier upon issuing and offering 1,400,000 shares of Class A common stock to members of the public at $10 per share. *Newrail Co.*, 354 I.C.C. 885, 886, 893 (1979). Upon completion of the tender offer, Union Pacific (which already held 10% of WesPac's shares) had been tendered an additional 77% of the outstanding shares of WesPac Class A common stock. 366 I.C.C. at 633.

Pursuant to the terms of the Agreement of Merger, Union Pacific and WesPac applied to the ICC for approval of Union Pacific's acquisition and exercise of control over WesPac as required by 49 U.S.C. §§ 11341-51. 366 I.C.C. at 471. In accordance with ICC regulations, *see* 49 C.F.R. § 1013.2 (1989), the shares that had been tendered were transferred to an independent voting trust pending the decision of the ICC. 366 I.C.C. at 472, 633. Certain shareholders of WesPac, who had not tendered their shares, intervened in the ICC proceeding and participated in it as active litigants. They argued there, as petitioner does here, that the $20 per share price for the WesPac stock was inadequate, among other reasons, because WesPac's real estate holdings were undervalued. *Id.* at 634. They also argued, as petitioner does here, that the Offer to Purchase was "misleading and coercive, [and] misrepresented the facts." *Id.*

On September 24, 1982, the ICC approved the Union Pacific-WesPac consolidation, finding that it would benefit the public through "service improvements, cost reductions resulting from operating efficiencies, enhanced competition, and a stronger financial position for the consolidated sys-

tem." *Id.* at 489. Under the heading "The Purchase Price", the ICC expressly considered whether the entire transaction price was fair, including the $20 per share paid for the 1,081,647 WesPac shares tendered in response to the Offer to Purchase and the $20 to be paid pursuant to the terms of the Agreement of Merger for the 178,553 shares that were retained by shareholders who opposed the merger. *Id.* at 633-38; *see also* Appendix to Petition ("A") at A-14.

WesPac and Union Pacific proceeded with the merger, which was approved at a special meeting of WesPac shareholders on May 24, 1983. In connection with this special meeting, WesPac circulated a Proxy Statement to the shareholders that included information as to the value of WesPac's non-operating real estate holdings, much of which had previously been reported. *See Deutsch v. Flannery*, 597 F. Supp. 917, 919 (S.D.N.Y. 1984).[2]

C. Petition To Reopen The ICC Proceeding

On May 9, 1983, shortly after dissemination of the Proxy Statement, a WesPac shareholder petitioned the ICC to reopen its proceeding and reconsider the fairness of the merger price, in light of the information as to land values included in the Proxy Statement, which he claimed had been withheld from the ICC. The ICC considered and denied the request, ruling that the new land value allegations were not materially different from the allegations made prior to the ICC's original decision. *Union Pacific Corp.*, Finance Docket No. 30,000 (Sub-No. 1) (ICC June 10, 1983).

D. The Appeal Of The ICC Order

The ICC's approval of the $20 per share purchase price for WesPac shares was appealed to the Court of Appeals for the District of Columbia Circuit by another WesPac shareholder who argued that the ICC had failed to give adequate weight to the value of WesPac's land holdings and had erred in find-

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2 As discussed below, *Deutsch v. Flannery* was a predecessor action filed by petitioner.

ing that the $20 per share offer was the result of arm's-length negotiations. The District of Columbia Circuit rejected these arguments. *Southern Pac. Transp. Co. v. ICC*, 736 F.2d 708, 726 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

E. Further ICC Proceedings

That shareholder then returned to the ICC and, under the auspices of the Western Pacific Stockholders' Protective Committee, sought to reopen the *Union Pacific-Control-Western Pacific* proceedings, in part, to consider "new evidence" regarding the value of WesPac land. The Protective Committee further alleged that "UPC withheld evidence as to the value of WP's land holdings during the merger proceeding." *Union Pacific Corp.*, Finance Docket No. 30,000 (Sub-No. 1), slip op. at 5 (ICC Jan. 28, 1987) (LEXIS, Trans. library, ICC file), *aff'd sub nom. Western Pac. Stockholders' Protective Comm. v. ICC*, 848 F.2d 1301 (D.C. Cir. 1988). In denying the petition, the ICC declared, once again, that "the land value allegations were similar" to those made and considered previously. *Id.* at 6. The decision also confirmed that the ICC had considered the entire purchase price (the $20 tender offer and the $20 back-end cash-out) in approving the merger. *Id.*

F. Petitioner's Action

Petitioner originally filed a complaint against respondents in the United States District Court for the Southern District of New York, where the complaint was dismissed because the allegations did not support an inference of fraud. *Deutsch v. Flannery*, 597 F. Supp. 917 (S.D.N.Y. 1984). For example, with respect to petitioner's land valuation claim, the court pointed out that WesPac had made substantial disclosures regarding the market value of its holdings and found that "[a] claim of fraud . . . cannot be based on failure to disclose the existence of the land and its value because that information had already been disclosed." *Id.* at 922 (citations omitted).

After voluntarily dismissing an appeal to the Second Circuit Court of Appeals, petitioner crossed the country and filed a virtually identical complaint in the Northern District of California. This complaint was initially dismissed on the ground of issue preclusion in light of the decision of the Southern District of New York. The Ninth Circuit affirmed in part, reversed in part, and remanded.[3]

Upon respondents' renewed motion, the district court dismissed petitioner's claims on the grounds that they were a collateral attack on an ICC order and were jurisdictionally barred by 49 U.S.C. § 11341 and by 28 U.S.C. §§ 2321 and 2342 (1988). A-13, A-14. In light of these rulings, the district court declined to address respondents' remaining ground for dismissal: petitioner's failure to satisfy the applicable statute of limitations. A-15. The Ninth Circuit unanimously affirmed.[4] A-1 to A-8. By order filed March 9, 1990, petitioner's request to the Ninth Circuit for rehearing was denied and petitioner's suggestion for rehearing *en banc* was rejected, no judge of that court having requested a vote on the suggestion for rehearing *en banc*. A-37. Petitioner now seeks a writ of certiorari.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Both the Ninth Circuit and the district court correctly applied the relevant provisions of the Interstate Commerce Act relating to railroad mergers, 49 U.S.C. §§ 11341-51, in dismissing petitioner's misplaced challenge to an aspect of the ICC-approved acquisition of WesPac by Union Pacific. Section 11341 of the Interstate Commerce Act grants the ICC exclusive jurisdiction over one railroad's acquisition of con-

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3 These decisions are reproduced in the Appendix to the Petition at A-29 to A-36 and A-16 to A-28.

4 The Ninth Circuit did not address the statute of limitations issue left outstanding by the district court.

trol over another and exempts "a carrier, corporation, or person participating" in such an ICC-approved transaction "from all other law . . . as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction." If petitioner disagrees with an aspect of the ICC approval of the Union Pacific-WesPac transaction, the proper remedy is to go back to the ICC, not to seek to evade the ICC's exclusive jurisdiction or to collaterally attack its approval by filing an action in federal district court.

ARGUMENT

I. THE NINTH CIRCUIT CORRECTLY APPLIED THE REGULATORY STRUCTURE CONGRESS SET FORTH IN 49 U.S.C. §§ 11341-51

Because the "maintenance and development of an economical and efficient railroad system [is] a matter of primary national concern," Congress has determined that issues pertaining to the consolidation, merger, and acquisition of control of one railroad by another, such as Union Pacific's acquisition of control over WesPac, should be placed within the exclusive regulatory jurisdiction of the ICC. *Schwabacher v. United States*, 334 U.S. 182, 194 (1948) (citation omitted). Congress intended this ICC jurisdiction to be "plenary and exclusive and independent of all other state or *federal* authority." *Id.* at 197 (emphasis added).[5] *See also Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) (the "Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes. . . .")

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5 In *Schwabacher*, the Court construed the predecessor sections to 49 U.S.C. §§ 11341-51, the statutory provisions pursuant to which the ICC approved the Union Pacific-WesPac merger. In recodifying the provisions of the Interstate Commerce Act construed in *Schwabacher*, Congress did not intend to make any substantive changes in the provisions of the Act. *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 299 n.12 (1987) (Stevens, J., concurring); and *see* 49 U.S.C.A. § 11341, Historical and Statutory Notes at 635 (West Partial Revision 1990).

The statutory scheme for regulating the acquisition of control of one railroad by another is currently found in subchapter III of Chapter 113 of the Interstate Commerce Act, 49 U.S.C. § 11341 *et seq.* Section 11341 provides that "[t]he authority of the Interstate Commerce Commission under this subchapter is *exclusive*," and that a participant in an ICC-approved transaction

> is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

49 U.S.C. § 11341(a) (emphasis added).[6] Section 11343 identifies the types of transactions that are subject to the ICC's plenary and exclusive jurisdiction and includes transactions such as Union Pacific's acquisition of WesPac. 49 U.S.C. § 11343(a)(3), (5). Section 11343(a) also makes clear that such transactions "may be carried out only with the approval and authorization of the Commission . . . ."

As mandated by 49 U.S.C. § 11343(a)(3), Union Pacific applied for and received ICC approval to acquire WesPac stock at $20 per share and thus control WesPac. As part of this approval process, the ICC was required to and did approve the $20 per share consideration paid by Union Pacific. This statutory duty was firmly established by the original version of 49 U.S.C. § 5(2), the predecessor to § 11343, which expressly directed the ICC to authorize and approve acquisitions "for such *consideration* . . . as shall be found by the Commission to be just and reasonable. . . ." Transportation Act of 1920, ch. 91, § 407, 41 Stat. 456, 481 (1920) (emphasis added). Although the statutory language has changed over the past 70 years, Congress did not intend to

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6 The words "from all other law, including State and municipal law" were substituted for "of all other restraints, limitations, and prohibitions of law, Federal, State or municipal" to eliminate redundancy, not to effect any substantive change. Historical and Statutory Notes, *supra* note 5, at 635.

modify the nature of the ICC review in any way and the ICC must still review and approve the consideration paid for the acquisition of control.[7]

This Court's decision in *Schwabacher*, 334 U.S. at 182, confirms that statutory obligation on the part of the ICC and the preemptive effect resulting from congressional placement of that obligation on the ICC. The plaintiffs in *Schwabacher*, shareholders of one participant in a proposed railroad merger, were dissatisfied with an ICC-approved merger plan and claimed they were entitled to more per share than the amount the ICC had determined to be just and reasonable. This Court held that such a claim could not be maintained outside the ICC:

> It appears to us inconsistent with the Interstate Commerce Act for the Commission to leave claims growing out of the capital structure of one of the constituent companies to be added to the obligations of the surviving carrier, contingent upon the decision of some other tribunal or agreement of the parties themselves. We think that the Commission must pass upon and approve all capital liabilities which the merged company will assume or discharge as a result of merger. If some greater

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7 While § 5(2), as amended by the Emergency Railroad Transportation Act of 1933, ch. 91, § 202, 48 Stat. 217, 217 (1933), no longer explicitly referred to approval of consideration, the express language requiring that the transaction be just and reasonable was maintained. 49 U.S.C.A. § 5(2)(b) (West 1959). Moreover, the accompanying Senate Report states, "[t]his paragraph, while it includes substantially the provisions of [§ 5(2) of the Transportation Act of 1920] . . . , is *more comprehensive* in its scope. . . ." S. Rep. No. 87, 73rd Cong., 1st Sess. 8-9 (1933) (emphasis added).

Similarly, the House Report accompanying the Revised Interstate Commerce Act, Pub. L. No. 95-473, 92 Stat. 1337 (1978), the legislation which enacted § 11343, is replete with statements that the legislation was enacted without making any substantive change in preexisting law (49 U.S.C. § 5(2)). In fact, in the very statement of the legislation's purpose, the Report states, "[t]he purpose of the bill is to restate in comprehensive form, *without substantive change*, the Interstate Commerce Act. . . ." H.R. Rep. No. 1395, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3009, 3013 (emphasis added).

> amount than that specified in the agreement is to be allowed to any class of stockholders, it must either deplete the cash or inflate the liabilities or capital issues of the new company.

334 U.S. at 197-98 (footnote omitted). Indeed, the Court determined that such claims were within the jurisdiction of the ICC even if the potential liability did not threaten the financial stability of the merged railroads.

> It may be that in this case the merged company will be strong enough to carry this burden and still perform its public service. But that is not the sole purpose of the supervision provided by statute. It is also in the public interest that no capitalization or indebtedness be carried over except that which meets the test of the Act in all other respects.

Id. at 198.

As the Ninth Circuit unanimously determined, there is "no principled basis for distinguishing *Schwabacher* from this case." A-5 to A-6 (footnote omitted). Indeed, the rule that ICC approval preempts subsequent shareholder claims outside the ICC for compensation beyond that which the ICC found just and reasonable applies with even more force here. In *Schwabacher*, the ICC had determined that the liabilities asserted by plaintiffs would not impair the surviving carrier through "a burden of excessive expenditure." 334 U.S. at 189, 197. Here, however, petitioner is seeking more than five times the amount per share approved by the ICC (*see* Petition ("Pet.") at 4). To permit such a claim to go forward in a non-ICC forum would undercut the regulatory structure Congress set forth in the Interstate Commerce Act. This is especially so in light of the fact that petitioner's claim relies on alleged land valuation claims of the sort that have been considered and rejected by the ICC several times. *See supra* at 4-5.

The Ninth Circuit's disposition of this action is entirely consistent with a long line of judicial decisions (in addition to

Schwabacher) recognizing the ICC's exclusive jurisdiction in limited instances such as this and the preemptive effect of the congressional grant of that exclusive jurisdiction to the ICC. *See, e.g., Chicago & N.W. Transp. Co.*, 450 U.S. at 327 (no common law claim for damages where adverse findings on issues essential to claim had previously been made by the ICC); *Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 799-802 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986) (federal Railway Labor Act must yield where it conflicts with ICC's exclusive jurisdiction). *See also Interstate Investors, Inc. v. Transcontinental Bus Sys., Inc.*, 310 F. Supp. 1053, 1060 (S.D.N.Y. 1970) (ICC approval bars recovery on antitrust claims); *Schwartz v. Bowman*, 244 F. Supp. 51, 67-69 (S.D.N.Y. 1965) (federal action under Investment Company Act dismissed where practical effect of success on merits would be to "invalidate 'in whole or in part' orders of the Commission"), *aff'd sub nom. Annenberg v. Alleghany Corp.*, 360 F.2d 211 (2d Cir.), *cert. denied*, 385 U.S. 921 (1966); *Bruno v. Western Pac. R.R.*, 498 A.2d 171, 174 (Del. Ch. 1985) (ICC approval bars Delaware stock appraisal action), *aff'd*, 508 A.2d 72 (Del. 1986), *cert. denied*, 482 U.S. 927 (1987). The decisions of the Ninth Circuit and the district court in this action are in full accord with these decisions, with the regulatory structure found in 49 U.S.C. §§ 11341-51, and with the express statutory language set forth in 49 U.S.C. § 11341.

Petitioner attempts to create the erroneous impression that the Ninth Circuit's judgment in this action has left WesPac shareholders without a forum to challenge the $20 per share paid to them. As discussed above, however, WesPac shareholders have had ample opportunity to challenge that price before the ICC and petitioner is simply unhappy with the ICC's determinations on that issue. Exclusive jurisdiction to review such ICC determinations is vested in the Courts of Appeals, 28 U.S.C. §§ 2321(a), 2342(5), and in this transaction the District of Columbia Circuit Court has exercised that jurisdiction and reviewed the pertinent ICC decisions twice. *Southern Pac. Transp. Co. v. ICC*, 736 F.2d 708 (D.C. Cir.

1984), *cert. denied*, 469 U.S. 1208 (1985); *Western Pac. Stockholders' Protective Comm. v. ICC*, 848 F.2d 1301 (D.C. Cir. 1988). Petitioner may not bring a collateral attack on such ICC determinations in a district court. *Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 799 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *Railway Labor Executives' Ass'n v. Staten Island R.R.*, 792 F.2d 7, 11-12 (2d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987). Petitioner's action under §§ 10(b) and 14(e) of the Securities Exchange Act of 1934 is just such an improper collateral attack.

Moreover, under the regulatory structure established by Congress, 49 U.S.C. § 11351, coupled with 49 U.S.C. § 10327(g)(1) (1982), provides for the ICC to exercise continuing jurisdiction over approved railroad consolidations and to make appropriate supplemental orders "[w]hen cause exists. . . ." *See also* 49 U.S.C. § 11701(a) (1982 & Supp. V 1987). If petitioner believes the ICC's determination approving the $20 per share purchase price was wrong, petitioner's proper remedy is to seek such a supplemental order.

II. PETITIONER HAS IDENTIFIED NO VALID REASON WHY A WRIT OF CERTIORARI SHOULD ISSUE

The petition sets forth a lengthy list of questions purportedly presented by this action and contains a lengthy discussion of reasons purportedly supporting the issuance of a writ of certiorari. Much of what is contained in the petition is simply irrelevant to this action. Moreover, the central issues raised and discussed in the petition have been previously raised and fully considered and answered by the courts below and the ICC. For example, contrary to petitioner's claim, the ICC did review and approve the $20 price paid pursuant to the tender offer, as both the district court and Ninth Circuit found. *Union Pacific Corp.*, 366 I.C.C. at 633-638; *Union Pacific Corp.*, Finance Docket No. 30,000 (Sub-No. 1) (ICC Jan. 28, 1987) (LEXIS, Trans. library, ICC file); A-14; A-8. Petitioner has identified no errors in those decisions, much less any that would justify the issuance of a writ of certiorari.

Nor has petitioner identified any conflict among the circuit courts.[8]

Petitioner misconstrues what has occurred in this action by suggesting that the Ninth Circuit has ignored the Securities Exchange Act of 1934, or found that act repealed by implication, or so misinterpreted the preemptive effect of the relevant portions of the Interstate Commerce Act as to deprive shareholders of significant rights. The Ninth Circuit did none of these things. The Ninth Circuit (as well as the district court) simply recognized and applied the limited preemptive effect of the ICC's exercise of its exclusive jurisdiction to review and authorize the consideration paid to shareholders in a railroad merger.

Petitioner's entire argument is marked by a complete failure to recognize and apply the explicit language of 49 U.S.C. §§ 11341-51 and the necessary preemptive effect of the ICC's limited exclusive jurisdiction thereunder. Thus, for example, when petitioner argues that the Ninth Circuit's decision does not comport with the requirements of the "repeal by implication" doctrine (*see, e.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)), petitioner ignores the fact that the repeal by implication analysis only applies "absent a clearly expressed congressional intention" that one federal statute should take precedence over another. *Pittsburgh & L.E. R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989). Here, just such an intention is found in the express exemption set forth in § 11341. *Interstate Investors, Inc.*, 310 F. Supp. at 1064 (repeal by implication analysis not applicable

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8 Petitioner seeks to create the appearance of a conflict with a district court by relying on *dicta* in *Bruno v. Cook*, 660 F. Supp. 306, 309 (S.D.N.Y. 1987). Moreover, contrary to petitioner's suggestion, nothing in the settlement in that action, which provides for the return to certain non-tendering shareholders of a portion of the interest earned on their $20 per share purchase price while it remained unclaimed during litigation, is inconsistent with the preemption of petitioner's claims which directly challenge that $20 per share price.

given the express exemption found in the predecessor to § 11341).[9]

Petitioner's reliance on *Pittsburgh & L.E.* reveals a fundamental misconception of the pertinent provisions of the Interstate Commerce Act. *Pittsburgh & L.E.* involved an acquisition of a carrier by a noncarrier approved by the ICC under 49 U.S.C. § 10901 (1982), found in Chapter 109 of the Interstate Commerce Act. That portion of the Interstate Commerce Act, unlike subchapter III of Chapter 113, where § 11341 is found, does not grant the ICC exclusive jurisdiction and does not contain an exemption for participants in an ICC-approved transaction. In light of these material differences in statutory language, the principles that should govern transactions subject to § 10901—such as found in *Pittsburgh & L.E.*—are not applicable to transactions subject to § 11341.

Petitioner makes a similar error in citing and relying on 49 U.S.C. §§ 11301(b)(1) and 11367 (1982 & Supp. V 1987). The language of § 11301, which governs the issuance of carrier securities, expressly makes it subject to the federal securities laws [Chapter 2B of Title 15 which includes § 10(b) (15 U.S.C. § 78j(b)) and § 14(e) (15 U.S.C. § 78n(e))].[10] In addition, neither § 11301 nor its predecessor, 49 U.S.C. § 20a

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9 If anything, it is petitioner who is relying on a repeal by implication argument since petitioner's claim rests on an argument that Congress has impliedly repealed the express grant of exclusive jurisdiction to the ICC set forth in 49 U.S.C. § 11341 and predecessor versions of that statute and the express grant of exclusive jurisdiction to the Courts of Appeals, set forth in 28 U.S.C. §§ 2321(a), 2342(5). Nothing cited in the petition supports such a claim.

10 This language resulted from the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976), which, in pertinent part, established concurrent jurisdiction between the ICC and the Securities and Exchange Commission over the issuance of securities by railroads. S. Conf. Rep. No. 595, 94th Cong., 2d Sess. 133, *reprinted in* 1976 U.S. Code Cong. & Admin. News 148. Nothing in those amendments sought to alter the ICC's exclusive and preemptive jurisdiction to approve railroad consolidations and mergers found in 49 U.S.C. §§ 11341-51.

(1976), contains the relevant provision granting express exemption from all other law upon ICC approval. In contrast, § 11341, which is applicable here, expressly exempts transactions affecting control that are approved by the ICC from all other law. *See Suffin v. Pennsylvania R.R.*, 276 F. Supp. 549 (D. Del. 1967), *aff'd*, 396 F.2d 75 (3d Cir. 1968), *cert. denied*, 393 U.S. 1062 (1969) (recognizing distinction between § 20a and § 5). Thus, cases such as *Shofstall v. Allied Van Lines, Inc.*, 455 F. Supp. 351 (N.D. Ill. 1978), and *Dorfman v. First Boston Corp.*, 336 F. Supp. 1089 (E.D. Pa. 1972) (Pet. at 13-14), involving the predecessor to § 11301 (§ 20a) are simply irrelevant. Similarly irrelevant is 49 U.S.C. § 11367(a) (1982 & Supp. V 1987), found in yet a different subchapter, which simply makes clear that "Section 14(a) of the Securities Exchange Act of 1934 . . . does not apply to a solicitation related to a proposed change under [that] subchapter."

Rembold v. Pacific First Fed. Sav. Bank, 798 F.2d 1307 (9th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987), also cited by petitioner (Pet. at 15-16), involved the relationship between the National Housing Act, 12 U.S.C. §§ 1725(j)(2) and 1730 a(k) (1988), on the one hand, and common law and federal and state securities laws, on the other. As the decision makes clear, in enacting the National Housing Act Congress expressed a clear intention not to preclude any existing cause of action under the antifraud sections of the securities acts or any other law. 798 F.2d at 1310. Moreover, the stock price at issue in that action was expressly not subject to approval by the Federal Home Loan Bank Board, the relevant regulatory agency. *See id.* at 1308, 1311. Exactly the opposite congressional intent and regulatory approval scheme exist under subchapter III of Chapter 113 of the Interstate Commerce Act.

SEC v. National Securities, Inc., 393 U.S. 453 (1969) and *Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986) (Pet. at 20, 21-22), are inapposite for similar reasons. In those actions, the approval of mergers by *state* regulatory agencies did not preclude subsequent actions under the securities laws. Neither decision involved a federal statutory scheme such as is found

in 49 U.S.C. §§ 11341-51 that grants a federal agency plenary and exclusive jurisdiction over issues pertaining to an acquisition and specifically exempts participants in an agency-approved transaction from all other law.[11]

Petitioner is also wrong in asserting that the statutory exemption from claims for more per share than the amount approved by the ICC is not "necessary." As explained above, Congress has vested exclusive jurisdiction in the ICC to approve the consideration that may be paid to shareholders in a railroad acquisition. An exemption from claims for more than the ICC-approved amount is necessary to protect that exclusive jurisdiction. In the absence of an exemption, a participant in such a transaction might find itself compelled in some other forum to pay a price other than that approved by the ICC. The purpose of the exemption is to prevent just such an interference with the ICC's regulatory authority. Indeed, as *Schwabacher* points out, such claims are preempted even if they do not present a threat to the financial success of the transaction.

Finally, contrary to petitioner's assertion, the statutory exemption does and should apply "retroactively" as well as prospectively. As the court in *Interstate Investors* succinctly put it in rejecting the same argument in connection with an antitrust claim:

> [I] find that Section 5(11) may be applied retroactively to immunize aspects of a transaction thereafter approved by the ICC. This conclusion is fortified, I believe, by the parallel conclusion, to which I turn next, that it would be incongruous to allow recovery under this complaint when the conspiracy, if any, which is alleged to have been formed prior to ICC authorization, was at the heart of the very transaction which was approved.

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11 Indeed, in *National Securities* the Court permitted the SEC to pursue "unwinding the merger and returning the situation to the *status quo ante*. . . ." 393 U.S. at 456, 463-64. There is no question that Congress intended, as demonstrated by 49 U.S.C. §§ 11341-51, that any decision regarding such relief in a railroad merger be vested exclusively in the ICC.

310 F. Supp. at 1063. Just as in *Interstate Investors*, the issue that petitioner seeks to litigate here—whether WesPac shareholders should be paid more than $20 per share—goes to the heart of the transaction approved by the ICC.

In sum, contrary to petitioner's assertion, the Ninth Circuit did not pick and choose between statutes; rather, it applied the express, limited exemption "from all other law" found in the pertinent subchapter of the Interstate Commerce Act. 49 U.S.C. §§ 11341-51. This subchapter grants the ICC plenary and exclusive jurisdiction to examine transactions whereby one carrier acquires control of another, and the exemption only applies in the limited circumstances where the ICC has reviewed and approved the transaction at issue pursuant to its statutory authority. Petitioner has not identified any valid reason why a writ of certiorari should issue to review that decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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